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27 March 2018

SETTLEMENT COMMUNICATION:  
SUBJECT TO CONFIDENTIALITY AGREEMENT/ FRE 408

*By Electronic And U.S. Mail*

Heidi Hoffman  
U.S. Department of Justice  
Environment and Natural Resources Division  
Environmental Enforcement Section  
999 18<sup>th</sup> Street, Suite 370, South Terrace  
Denver, Colorado 80202

Re: Settlement Negotiations, United States, et al. v. City of Colorado Springs (D.Colo.)  
(1:16-cv 02745-RPM)

Dear Heidi:

On behalf of the Lower Arkansas Valley Water Conservancy District (Lower Ark District), this letter is in response to the United States' letter of March 19, 2018, to the City of Colorado Springs (City) concerning settlement negotiations in the above-captioned case. The Lower Ark District's letter supplements the response of the State of Colorado to the United States' March 19, 2018 Letter, which the Lower Ark District joins in its entirety.

The Lower Ark District has long been concerned with the water quality in Fountain Creek, which drains the watershed that encompasses the City, and flows through the District to Kansas after joining the Arkansas River in Pueblo. Segments of Fountain Creek downstream of the City and upstream of and within the District have been listed as impaired for E. coli, a human pathogen, on Colorado's 303(d) list since 2008. There is evidence that the E. coli impairment is associated with the City's stormwater.

The Lower Ark District negotiated for several years with the City to address *inter alia* the impacts of the City's stormwater on Fountain Creek. After the City ceased negotiating, the Lower Ark District mailed a notice of intent to file a citizens enforcement action concerning the City's violations of its stormwater permit pursuant to 33 U.S.C. § 1365(b)(1)(A). NOI, dated Nov. 19, 2014. The District was not surprised to learn that EPA found in 2015 "that little

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progress had been made by the City since the EPA February 2013 inspection to provide adequate funding, staff, and equipment to implement the MS4 program to reduce the discharge of pollutants from the MS4 and protect water quality to the maximum extent practicable.” The District was of course pleased when it subsequently learned that EPA, in cooperation with the State, had engaged the City in discussions to bring the City into compliance with its stormwater permit. When those negotiations failed, EPA and Colorado filed an enforcement action in U.S. District Court for Colorado, which included all of the violations alleged in the District’s NOI, plus specific violations identified in EPA’s inspections. Foreclosed by the Clean Water Act from bringing its own suit while EPA is diligently prosecuting a civil action to require compliance, 33 U.S.C. § 1365(b)(1)(B), the Lower Ark District moved – with EPA and the State’s support – to intervene in EPA’s enforcement action against the City.

The Lower Ark District has enjoyed a close working relationship with EPA, Colorado and Pueblo County, another plaintiff-intervenor, from the start. The foundation for that relationship is that all of the plaintiffs and plaintiff-intervenors would work together to obtain the City’s compliance with its permit, and that none would take any unilateral action without the concurrence of the other plaintiffs and plaintiff-intervenors. In a direct affront to that relationship, the United States’ unilaterally responded to the City’s request to restart settlement negotiations without any response to the February 5, 2018 letter to EPA from Colorado, the Lower Ark District and Pueblo County setting forth our joint conditions for negotiating with the City. Moreover, the United States’ Letter clearly declared its intention to move forward with settlement negotiations without regard for the Lower Ark District’s long-standing concerns.

The Lower Ark District respectfully requests that the United States take a step back, cease all settlement discussions with the City, and meet with the District, State and County to discuss and agree on how to approach joint settlement negotiations with the City. Furthermore, without the presence of all parties in settlement negotiations, the United States should not count on the Lower Ark District’s support for settlement, or that the District would neither object to the dismissal of its claims nor forgo the enforcement action it initiated with its NOI.

Very truly yours,



Peter D. Nichols

cc: Martha Rudolf, Environmental Director, Colo. Dept. of Public Health and Environment  
Margaret Parish, First Asst. Attorney General, Colorado Dept. of Law  
Thomas W. Korver, Counsel, Pueblo County